Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-819

EDWARD V. REGAN, Individually and as County Executive of Erie County; RAYMOND F. GALLAGHER, as Chairman of the Erie County Legislature; ALFREDA W. SLOMINSKI, as Comptroller of Erie County; FRED J. BUSCAGLIA, as Commissioner of the Erie County Department of Social Services; ERIE COUNTY LEGISLATURE; COUNTY OF ERIE; and BARRY VAN LARE,

Appellants,

against

PHILIP L. TOIA, Individually and as Commissioner of the New York State Department of Social Services; HUGH L. CAREY, Individually and as Governor of the State of New York; ARTHUR LEVITT, Individually and as Comptroller of the State of New York; JAMES H. TULLY, JR., Individually and as Commissioner of Taxation and Finance of the State of New York; PETER GOLDMARK, Individually and as Director of the Budget of the State of New York; THE NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES; and PEOPLE OF THE STATE OF NEW YORK,

Appellees.

On Appeal From the Court of Appeals of New York.

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

Statement

Appellants hereby submit this brief in reply to appellees' motion to dismiss or affirm submitted in answer to the jurisdictional statement filed herein.

POINT I

Appellants have standing to bring this appeal.

Respondents erroneously claim that appellant Regan lacks standing in his individual capacity as a taxpayer, citing as authority for this proposition *Schlesinger v. Reservists to Stop the War*, 418 U.S. 208 (1974) and *Sierra Club v. Morton*, 405 U.S. 727 (1972). Both cases have no bearing on the case at bar. In the former case the injury alleged, the claimed non-observance of the incompatibility clause by members of Congress, was termed by the Court as an abstract as opposed to a concrete injury essential to confer standing. In the *Sierra Club* case, the Court ruled there was no standing to seek judicial review under the Administrative Procedure Act since no member of the Sierra Club had alleged any present or future injury. In contrast, appellant Regan asserts a concrete claim of pocketbook injury which this Court has long recognized confers standing to sue. Since taxpayer Regan clearly has standing in that capacity, any further standing he enjoys in his official capacity, or any standing that Erie County may enjoy as a municipal corporation, is therefore redundant.

The Court should further note that appellant Regan also has standing as an official entitled to a determination of his legal rights and duties. *Board of Education v. Allen*, 51 Misc. 2d 297, Rev'd. 27 A.D. 2d 69, Aff'd. 20 N.Y. 2d 109, Aff'd. 392 U.S. 236. Moreover, since the State has conferred constitutional rights of local government to Erie County, appellants urge that the County has standing to assert and protect those rights from unconstitutional infringement before this Court.

POINT II

The Court in *Lindsay v. Wyman* restricted its decision to the facts therein and prescinded from applying its rule to a fact situation similar to that at issue herein.

In attempting to attack appellants' argument distinguishing the holding in *Lindsay v. Wyman*, 372 F. Supp. 1360, aff'd. *sub nom. Beame v. Lavine*, 419 U.S. 806 (1974), appellees have in fact conceded such argument by agreeing that New York City has both greater obligations and greater resources than does Erie County (Motion to Dismiss or Affirm, p. 4).

The *Lindsay* decision was predicated explicitly on the proposition that New York City enjoys extraordinary resources as well as obligations. The Court pointed out:

> "But it is also true that the Legislature may base its failure to provide *more* than across-the-board contributions to the City, as it now does, on several rational grounds. *** It may recognize that the greater property values in the City of New York and its greater per capita wealth enable it better to carry its burden of welfare."
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> "The City of New York has separate taxing powers of its own granted by the State Legislature. Special revenue raising powers are given to the City from time to time by the State Legislature after review of the City's budgetary needs. These decisions may have turned, rationally, on the minimal needs of the City in the supply of municipal services, including welfare. They may have included, rationally, consideration of the additional costs of welfare to the City of New York, because of its huge welfare burden. We simply do not know the extent to which the welfare requirements of the City under the present Social Services Law Prompted the Legislature to

> grant additional revenue raising powers to the City of New York that it might not otherwise have granted." 372 F. Supp. 1360, 1367, 1368.

The Court recognized, on the other hand, that poorer counties were differently situated and expressed doubt as to whether it would be constitutionally permissible to impose a part of the New York City's burden on them:

> "We do not know whether casting a relatively heavier burden on poorer counties under a new formula would satisfy this federal requirement." 372 F. Supp. 1360, 1367.

That New York City constitutes a special situation both because certain special taxing powers are granted to it alone and because many of its taxes are borne by non-residents is beyond question.* The facts show that Erie County is a "poorer county" as denominated by the *Lindsay* decision. Therefore, by its own statement, the Court specifically pointed out that *Lindsay* was not *stare decisis* in respect to a municipality such as Erie County.

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* A sampling of some of the taxes unique to New York City may be found in the *New York Times*, Sunday, May 18, 1975, "New Yorkers Subjected to 22 Different Kinds of Taxes", which was appended to appellants' Appellate Division brief as Appendix A. As an example of the city's load being carried by non-residents, the New York State Department of Commerce publication, *Taxes and Plant Location in New York and Other Industrial States*, November, 1968 states at p. 15:

> "...New York City's position as a vacation, shopping and business center means that a substantial share of the City's retail sales tax among others, is paid by visitors."

CONCLUSION

The appellants have standing to bring this appeal. *Lindsay v. Wyman* is not in point and does not constitute *stare decisis*.

Respectfully submitted,

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